(31)

No. 95-1184

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
Petitioner,
v.
WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.; GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.; CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.; KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA FARMS, INC.; and MIHARA FARMS,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

A. Introduction

Respondents respectfully file this supplemental brief pursuant to Supreme Court Rule 15.8 to call the Court's attention to *44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc.* v. *Rhode Island Liquor Stores Association*, 96 Daily Journal D.A.R. 5459, decided May 13, 1996. This recent case made determinations under the *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n. of N.Y.*,

447 U.S. 557 (1980) commercial speech rubric that are helpful to the disposition of the instant petition.

B. Regulation Of Commercial Speech To Manipulate Product Consumption Market-Wide Cannot Rely On Legislative Judgment; The Government Must Put Forth Evidence Which Demonstrates That The Regulation Sufficiently Directly Advances The Purported Aim

In *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. 5459, the Court reviewed Rhode Island's prohibition of retail price advertising which Rhode Island claimed was for the purpose of manipulating consumption of alcoholic beverages market-wide. Because Rhode Island did not produce evidence to support its claim that the regulation directly advanced its aim of reducing alcoholic beverage consumption, and the regulation was more extensive than necessary, the Court struck down the regulation under *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n. of N.Y.*, 447 U.S. 557 (1980). *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at pp. 5464-5465

In striking down Rhode Island's prohibition of retail price advertising for alcoholic beverages, the Court began by reasoning that while generally the government must demonstrate that regulation impacting commercial speech advances the asserted interest "to a material degree," where the government suppresses truthful, nonmisleading information the government must bear a heavier burden and show that the regulation will "significantly" advance the purported aim. *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at p. 5464.

More important in context here, the Court underscored the need for evidence of direct advancement of the purported governmental aim of manipulation of product consumption. The Court noted that a prohibition against price advertising, like a collusive agreement among competitors,

will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market. *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at p. 5464. The Court also noted that demand, and thus consumption throughout the market, is somewhat lower when a higher noncompetitive price level prevails. *Id.*

However, the Court held that without any findings of fact, or indeed any evidentiary support at all, the Court could not agree that the price advertising ban would significantly reduce market-wide consumption of alcoholic beverages. *44 Liquormart, Inc.*, 96 Daily Journal D.A.R at pp. 5464-5465. As a result, Rhode Island's regulation failed to directly advance the asserted interest in manipulating product consumption. *Id.*

The instant case is about an evidentiary hearing and an administrative record where the Department of Agriculture ("USDA") similarly failed to present any evidence to sustain its burden under *Central Hudson*, 447 U.S. 557. USDA failed to show that, under *Central Hudson*, 447 U.S. 557, its assessment funded generic advertising program (imposed only on California handlers of peaches and nectarines) both directly advanced the purported governmental aim and was sufficiently narrowly tailored to achieve this end.[1] See, App. to Pet. for Cert. p. 21a.

Even greater than Rhode Island's failure in *44 Liquormart, Inc.*, to present evidence showing the advertising ban would *significantly* **reduce** consumption of alcoholic beverages, here USDA failed to present any evidence that, under a lesser burden, its forced funded generic advertising

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[1]The Secretary imposes the generic advertising program under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. section 601 *et seq.* ("AMAA"), and the content of the generic advertising program is controlled by committees, consisting of respondents' competitors, appointed by the Secretary. See, Opp. to Pet. for Cert. p. 2.

program *materially* **increased** consumption of peaches and nectarines.[2] See, App. to Pet. for Cert. pp. 19a-22a. USDA also failed to demonstrate the program was narrowly tailored to achieve the desired objective. See, App. to Pet. for Cert. pp. 20a-21a. The decision in ***44 Liquormart, Inc.***, 96 Daily Journal D.A.R. 5459, supports the Ninth Circuit's determination to require USDA to substantiate direct material advancement of the purported aim of manipulating an increase in the consumption of the products.[3]

This is particularly true since the *44 Liquormart* Court rejected deferring to a legislative choice among means of

[2]USDA tried to make up for this by attaching a chart to its brief to the Ninth Circuit in an attempt to show that peach and nectarine production increased in the 1980s. See, App. to Pet. for Cert. p. 19a. The Ninth Circuit correctly pointed out that the chart provided no evidence as to causation—any increase may have been due to weather, cultivation techniques, or more likely the planting of additional trees. See, App. to Pet. for Cert. pp. 19a-20a.

[3]On May 20, 1996 a California Appellate Court ruled the California Kiwifruit generic advertising program unconstitutional as violative of the First Amendment. Similar to the Ninth Circuit's analysis in *Wileman Bros. & Elliott, Inc. v. Espy* (9th Cir. 1995) 50 F.3d 1367 and *Cal-Almond, Inc. v. U.S. Department of Agriculture* (9th Cir. 1993) 14 F.3d 429, the Court in *California Kiwifruit Commission v. Moss* (3rd Dist., May 20, 1996) 96 Daily Journal D.A.R. 5783, concluded that the Kiwifruit Commission had "presented no studies or evidence of any kind tending to show that the Commission's generic promotion . . . sells Kiwifruit more effectively than specific targeted marketing efforts of individual producers." *Id.*, at 5790. The court further found that "the Commission presented no evidence that individual promotion efforts are insufficient to advance the State's interests in expanding the Kiwifruit industry," and that the Commission's argument that the individual grower's advertising efforts were insufficient to advance the State's interests in expanding the Kiwifruit industry failed because the Commission presented no evidence that absent the compelled marketing program, growers could not/would not ban together voluntarily and use their combined resources to promote their Kiwifruit crops on a national and international level. *Id.*

achieving the governmental aim of manipulation of consumption of a product. In reliance on *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328, Rhode Island argued that because expert opinions as to effectiveness of price advertising "go both ways" the legislature made a reasonable choice when deciding to ban the advertising. The Court concluded that this argument failed because the analysis in *Posadas* was flawed. *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at p. 5465. The Court held that *Posadas* erroneously performed the First Amendment analysis when reasoning that because commercial speech concerns products and services that the government may freely regulate, greater deference must be afforded a legislative determination to regulate commercial speech to achieve the government's ends. *Id.*

USDA also has misplaced reliance on the existence of legislative judgments about the efficacy of USDA's regulations aimed at manipulation of product consumption. USDA argues in its petition that commercial speech enjoys only a limited measure of protection and therefore Congress should be afforded greater latitude in making regulations impacting commercial speech to achieve the governmental aim of manipulating product consumption. See, Pet. for Cert. p. 18.

Additionally, USDA filed a supplemental memorandum focusing on a bill signed into law on the day USDA's reply brief went to press—the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act) Pub. L. No. 104-127, 110 Stat. 888 (enacted April 4, 1996).[4] USDA claims this bill underscores the importance of its Petition. See, Supp. Mem. For Petitioner p. 4.

[4]Respondents' Opposition to Petition for Writ of Certiorari noted that legislation was pending in both houses of Congress related to the Farm Bill. See, Opp. to Pet. for Cert. p. 14, n. 14.

Like the inability of Rhode Island's legislative judgment to prove that the regulation would directly advance the purported governmental aim of manipulation of product consumption in *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at p. 5465, any authority granted the Secretary of Agriculture under the AMAA or the recently enacted FAIR Act does not make up for the lack of evidence in the administrative record reviewed in this case.[5]

Finally, USDA argues in its petition and reply brief that respondents benefit from the AMAA and respondents have voluntarily chosen to market the products in question, therefore USDA's generic advertising program should be given deference. See, Pet. for Cert. p. 19; Reply Br. for Pet. p. 6. In *44 Liquormart Inc.*, 96 Daily Journal D.A.R. at p. 5466, the Court rejected this form of syllogism. The Court said that the state's licensing of liquor retailers did not change the First Amendment analysis of whether Rhode Island met the *Central Hudson* test. *Id.* The Court reasoned that "[e]ven though the government is under no obligation to provide a person, or the public, a particular benefit, it does

[5]The court in *California Kiwifruit Commission v. Moss, supra,* 96 Daily Journal D.A.R. at 5790, rejected the Commission's reference to legislative declarations expounding on the necessity of forced generic advertising to expand the Kiwifruit industry. The Court commented that legislative declarations are meaningless:

> "A mere assertion that a regulation directly advances, or is necessary to advance, a governmental interest is insufficient to justify it; rather, a governmental body seeking to sustain a regulation on commercial speech must demonstrate that 'the harms it recites are real' and that its regulation 'will in fact alleviate them to a material degree.' [Citations]. Furthermore, where a law is subjected to a colorable First Amendment challenge, the difference afforded to legislative findings does not foreclose independent judicial review of the facts to assure that, in formulating its judgment, the legislative body has drawn reasonable inferences based on substantial evidence. [Citations]."

not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right [citation omitted]." *Id.* Thus, even assuming, *arguendo*, a benefit is conferred on respondents by the AMAA, it does not mean respondents surrender their First Amendment rights. Moreover, in contradistinction to USDA's press for more deference, *44 Liquormart, Inc.* shows that the Court is not leaning toward less scrutiny of government regulation impacting commercial speech, but instead toward stricter scrutiny.[6,7]

C. Conclusion

USDA's failure to present evidence to sustain its burden under *Central Hudson*, the recent bills referenced by USDA and respondents, USDA's belated attempt on a motion for reconsideration in the Ninth Circuit to argue *Central Hudson* should not have been applied to the generic advertising

[6]See, e.g., *44 Liquormart, Inc.*, 96 D.A.R. at p. 5470 (Thomas J., concurring opin.) [Where government asserted interest is to manipulate choices in marketplace, regulation should be per se illegitimate]; (Scalia J., concurring opin. at p. 5469 [sharing J. Thomas's discomfort with *Central Hudson*, but case does not present wherewithal to declare *Central Hudson* wrong or wherewithal to say what ought to replace it]; (O'Conner J., concurring opin. at p. 5474) [Because state failed to establish reasonable fit between abridgement of speech and goal under less strict scrutiny that generally applies in commercial speech cases, Court need not question whether test employed since *Central Hudson* should be displaced].

[7]Justice Nicholson applied a strict scrutiny standard to the Kiwifruit forced generic advertising program. Justice Nicholson concluded that the issue before the court was not whether the Kiwifruit Commission could disseminate a particular message, but "whether the state may force a grower to accept and subsidize the Commission as his mouthpiece." Justice Nicholson found mandatory subsidization of the Kiwifruit Commission to be an infringement upon the grower's rights of freedom of association. *California Kiwifruit Commission v. Moss, supra,* 96 Daily Journal D.A.R. at 5786.

program, and the concurring opinions in *44 Liquormart Inc.*, 96 Daily Journal D.A.R. 5459 teaching that revisiting the propriety of *Central Hudson* should await a day when the issue is properly before the Court, weigh against review of this case.

For all the foregoing reasons and the reasons in respondents' opposition brief, the petition should be denied.

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Respectfully Submitted,

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